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Mary J. Howard v. Ringsby Truck Lines, Inc. and Horace Byington : Brief of Appellant

Utah Supreme Court

D. Howe Moffat; Wendell C. Day; Attorneys for Appellants;

Case No. 8030

IN THE SUPREME COURT
of the
STATE OF UTAH

MARY J. HOWARD,
Plaintiff and Appellant,

— vs. —

RINGSBY TRUCK LINES, INC. a corporation, and HORACE BYINGTON,
Defendants and Respondents.

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STATEMENT OF FACTS

This is an action brought for the wrongful death of Francis A. Howard and of Allen Howard, by the wife and mother, Mary Howard.

Francis A. Howard, the husband, age 41 (R. 157) and his son, Allen Howard, age 14, on the 19th day of October, 1951, left Salt Lake City to go deer hunting and met Lloyd Howard, a brother, his wife and daughter, at the mouth of Parleys Canyon (R. 57). Frank was driving a jeep pickup truck (R. 57) he borrowed from Henry Day of Draper, Utah, his employer, and Allen, his son, was riding with him. Lloyd Howard, his wife

and daughter were riding in Lloyd's Studebaker Sedan. They proceeded to Heber City, then when half way up Daniels Canyon, they met other brothers repairing a trailer tire and they stopped and helped (R. 85). The other brothers were Ewan, Brady and Ren (R. 86). From this point Frank started first in the jeep pickup and was followed by Lloyd, his wife and daughter. A little further up Daniels Canyon, Lloyd passed Frank. Just before they arrived at Current Creek on Highway 40 (R. 87), Lloyd stopped to look at some deer and Frank and his son stopped also (R. 87). The last time Lloyd saw Frank's pickup truck was just before they got to Fruitland when he saw him through the rear vision mirror. Lloyd drove on Highway 40 to the Junction of the Tabiona Road where he turned North on the Tabiona Road, drove over Fruitland Bench and stopped to wait for Frank (R. 88). Frank, with his son, proceeded along Highway 40 and came down the hill to cross the Red Creek Bridge (R. 29) (R. 55) (R. 90) (R. 115) (R. 121); there the jeep pickup hit the Southeast corner of the bridge and proceeded across the highway and collided, on approximately the North edge of the oiled surface of the road, at a point 225 feet East of the bridge (R. 32), with a truck driven by Defendant Byington and operated by Defendant Ringsby Truck Lines, Inc.

At the scene of the accident there is a road running to the South and a relatively level area to the North side of the highway designed to allow West bound vehicles to turn into the road running south. The Ringsby Truck, driven by the Defendant Byington and operated

by the Defendant Ringsby Truck Lines, Inc., apparently ran over the jeep pickup truck, then it proceeded across the turn out area to the North of the highway and finally collided with some large boulders 135 feet from the point of impact, (R. 34), and came to a stop. The jeep pickup truck had been knocked North and West some 86 feet from the point of impact when it started to burn, it came to rest approximately 15 feet to the rear of the Ringsby truck.

The Ringsby truck was powered by a 300 horse power diesel engine in a 1951 Kenworth tandem axle tractor and was pulling a Fruehauf stainless steel trailer 35 feet in length. The entire unit was 53 feet 6 inches in length. It had been loaded at Grand Island, Nebraska, with explosives, and the gross weight of the truck, trailer and cargo was 60,900 pounds. Apparently, Defendant Byington, the driver of the Ringsby Truck, and his relief driver, who was riding in the sleeper part of the truck, abandoned the two vehicles immediately after the collision.

Vernon A. Williams and Stanley Sutherland, driving easterly along the highway, came upon the truck and burning pickup, stopped, found a man's body projecting from the burning pickup, then noticed a sign "Explosives" on the Ringsby truck (R. 13, 14 and 15) and then drove their car to the East around the corner of the mountain and stopped. Williams flagged the West bound traffic and Sutherland went West across Red Creek and flagged the East bound traffic (R. 19). Floyd Hartman, driving West along Highway 40 for the pur-

pose of hunting South along Red Creek came to the stopped cars, was told there was a truck of explosives about to explode. He went down along the side of the dugway (R. 72, 73 and 74) and found that the Ringsby truck load of explosives was not on fire and probably would not get on fire. He inspected the wreck heard a moaning sound and found Allen Howard some 10 or 12 feet East of the jeep pickup truck, his breathing in a pool of blood making the noise (R. 75). He endeavored to clean up Allen Howard, took him in his arms, ran up the highway and pursuaded three unknown boys to take Allen to Duchesne, which they did. Allen died shortly after arrival (R. 77). Hartman then started the traffic moving West and Glen Wing, a Radio Technician for the State Highway Patrol, was in the traffic on the West side of Red Creek. Wing went down to the scene of the accident, helped put out the fire, and removed the body of Francis A. Howard. Defendant Byington, the driver of the Ringsby truck told Wing at that time that his speed was 45 miles per hour as he was going West approaching the Red Creek Bridge and he said, according to Mr. Wing that "He observed this pickup truck as it hit the abutment of the bridge and then continued on down the highway and that is the last he saw of it (R. 29)."Wing says he didn't ask the driver how fast the pickup truck was going. There was no evidence, on either the oiled portion of the road East of the point of impact or on the graveled portion of the turn-out indicating the application of brakes before the impact (R. 40). Byington, the Ringsby truck driver, apparently told a lot of people that the

pickup truck hit the Southeast abutment of the bridge. Each of the witnesses quoted him differently. Lloyd Howard said that the driver told him, "He saw the jeep hit the bridge. He didn't see it again" (R. 90). He told Brady, however, "It looked like it hit the corner of the bridge and went out of control and it cut across, crosswise, across the road and he didn't see it any more until he felt the impact." (R. 115). He told Dale Howard, "He saw the jeep truck hit the bridge; he figured it hit the bridge and it came across the road until it hit his truck." (R. 21).

The truck of the Defendant was coming down a 6% grade and the jeep pickup from the point of hitting the bridge to the point of impact was going up a 6% grade (R. 130). All of the stopping distance prior to the point of impact would have been upon the hard surface part of the road. Most of the stopping distance after the impact would have been upon gravel (R. 139). The brakes of the truck at the time would not have been heated but would have been cold (R. 142). Taking into consideration the speed of 45 miles per hour and assuming that all of the stopping could have been accomplished on gravel, the truck could have been stopped in 130 feet, (R. 148) and including a reaction time of ¾ of a second it could have been stopped in 180 feet.

The Defendants moved the Court to dismiss the First Cause of Action on the grounds that the evidence conclusively showed, as a matter of law, that Francis A. Howard was negligent in being on the wrong side of the highway and there was no evidence that Defendant By-

ington was negligent and also moved to dismiss the Second Cause of Action on the grounds that as a matter of law there was no act or conduct of Byington which was the legal cause of the accident, resulting in the death of Allen Howard (R. 168-169). The Court granted both motions (R. 170).

STATEMENT OF POINTS RELIED UPON FOR REVERSAL

I. THE COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION.

A. At the moment that the jeep pickup truck, being driven by Frank Howard struck the Southeast corner of the Red Creek bridge, which Defendant Byington saw at the time it happened, Byington ought to have realized the danger in which Frank Howard was placed and there was sufficient time before the collision so that Byington, by the exercise of reasonable care and by the use of the instrumentalities under his control and under the conditions then existing, could have avoided the accident.

II. THE COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND CAUSE OF ACTION.

A. When Byington saw the pickup jeep in which Allen Howard was riding strike the Southeast corner of the Red Creek bridge he should have realized the danger in which Allen Howard was placed and thereafter Byington had ample time, by the exercise of reasonable care, and by the use of the instrumentalities under his control, and under the conditions then existing, to have avoided the accident.

III. THE COURT ERRED IN ENTERING THE FIND-

INGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT IN THE ABOVE ENTITLED MATTER.

A. Paragraph 7 of the Findings of Fact concerning the First Cause of Action is erroneous in that the court finds that the Plaintiff has failed to produce any evidence to prove the Defendant was gulity of any negligence which approximately caused the collision and subsequent death of Francis A. Howard.

B. Paragraph 6 of the Findings of Fact concerning the Second Cause of Action is erroneous in that it finds that Plaintiff has failed to produce any evidence that the Defendants were guilty of any negligence whatsoever which approximately caused the collision and subsequent death of Allen Howard.

C. That the Judgment is erroneous wherein it ordered, adjudged and decreed that the First and Second Cause of Action be dismissed upon the merits and with prejudice.

ARGUMENT

Frank Howard, an automobile mechanic, driving a jeep four wheel drive pickup truck in an Easterly direction on Highway 40 on October 19, 1951, with a son, Allen, age 14, as his passenger, in the exercise of due and reasonable care under all of the circumstances, struck the Southeast corner of Red Creek bridge, throwing the jeep pickup truck out of control (R. 184) which caused the pickup truck to travel across the highway into the path of Defendant's oncoming vehicle.

Defendant's truck at said time was traveling at 45 mph. The evidence does not disclose the speed of the jeep pickup truck nor does it disclose the reason for the jeep pickup truck hitting the Southeast corner of the bridge.

The fact is that the jeep pickup did hit the corner of the bridge and was thrown out of control, which fact was discovered at the time it occurred by the Defendant. Thereafter the jeep traveled 225 feet across the highway to the North shoulder where it was literally run over by Defendant's truck.

The evidence does not disclose how far East of the point of impact the Defendant's truck was at the time the driver, Byington, saw the jeep pickup hit the bridge. The following table might be helpful on this question:

(a) Jeep moving at 40 mph. travels 58.7 feet per second. Travels 225 feet in 2.84 seconds.

(b) Jeep moving at 45 mph. travels 66 feet per second. Travels 225 feet in 3.41 seconds.

(c) Jeep moving at 50 mph. travels 73.3 feet per second. Travels 225 feet in 3.7 seconds.

(d) Jeep moving 60 mph. travels 88 feet per second. Travels 225 feet in 2.56 seconds.

The testimony is undisputed that the truck speed was 45 mph., and we assume that is a reasonable speed and the driver of the jeep, in the absence of any other testimony, was driving at a reasonable speed, which for the purpose of this argument would be 45 mph., and we further assume that neither the jeep or the truck reduced their speed up to the place of impact, this being the most favorable assumption to sustain the trial court's rulings, then the truck was 450 feet from the bridge and 225 feet from the point of impact at the time that the driver discovered the danger in which the two deceased subjects of this lawsuit were placed by the collision with the

bridge. If we further assume a ¾ second reaction time, for the driver of the truck, before acting, this being the only testimony on the subject (R. 149), the driver, after the reaction time, was still 384½ feet from the bridge or 159.5 feet from the point of impact. The only testimony on stopping distance is that of Dr. Frank Y. Harris, who testified that after taking into consideration the 6% down grade on which the truck was traveling and the fact that part of the travel was on oil and part on gravel, and assuming that the co-efficient of friction for the truck was that of gravel for the entire distance, this assumption again being most favorable to Defendant, still the truck could have been stopped in 130 feet (R. 148).

There is no evidence that the truck applied its brakes at any time (See statement of counsel R. 131), or attempted to change its course or do anything to avoid colliding with the jeep pickup truck. It hit the jeep with such force that it actually threw it 86 feet (R. 26), then traveled on a distance of 135 feet (R. 26), to collide with some big boulders and did extensive damage to the truck as a result of the impact with the boulders. (See exhibits 24, 25, 26 and 27).

Byington's legal responsibilities as he came West on Highway 40 approaching the Red Creek bridge were,

1. To keep a look-out for other users of the highway,
2. To have his truck under such control that he could, by the exercise of reasonable care avoid doing harm to other users of the road,

and

3. To so drive the truck that at all times he could, as a reasonable man, steer or stop the vehicle so as to avoid harm to others.

This Court has had occasion, many times, to pass upon what has generally come to be known of as the "last clear chance doctrine", in

Watkins v. Utah Poultry, 251 Pac. 2d 668, Utah 1952.

This court approved of

Restatement of the Law of Torts, Vol. 2, Sec. 479, P. 1253

as follows:

"S. 479. Defendant's Last Clear Chance.

"A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,

(a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and

(b) the defendant

(i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or

(ii) knows of the plaintiff's situation and has reason to realize the peril involved therein; or

(iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the

vigilance which it was his duty to the plaintiff to exercise, and

(c) thereafter is neligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

The situation presented to Byington was a jeep pickup truck striking the Southeast abutment at the end of the 100 foot long narrow (20 feet wide) Red Creek Bridge and going out of control. Byington at the moment of the impact between the pickup truck and the bridge was discharging his legal responsibilities, to-wit, he saw the pickup hit the bridge, he was driving his truck at a reasonable rate of speed (45 mph.). There is nothing in the evidence which would indicate he did not have his truck under control so that he could have steered or stopped the truck and thereby have avoided doing harm to the occupants of the jeep pickup truck. At that moment Byington was driving upon a relatively narrow oil road, down a 6% grade, and could have stopped, including his reaction time, in 180 feet. He didn't stop. There is some evidence from which the jury could find that from the time of the impact of the jeep with the bridge to the time of the collision between the jeep pickup and the Ringsby truck, Byington failed to keep any kind of a lookout. As a matter of fact, one witness quotes Byington as saying he did not see the jeep pickup from the time of the collision with the bridge to the time the jeep collided with his truck (R. 29). The evidence is rather clear that he did not reduce the speed of his vehicle and although Byington was under the obligation of operating

his vehicle upon the right half of the road, 44-6-54, Utah Code Annotated, 1953, that obligation is relative and as stated in

Vol. 2, Restatement of the Law of Torts Page 754

> "Thus a statute or ordinance requiring all persons to drive on the right side of the road may be construed as subject to an exception permitting travelers to drive on the other side, if so doing is likely to prevent rather than cause the accidents, which is the purpose of the statute or ordinance to prevent."

See also

24 A. L. R. 1308
63 A. L. R. 280

The evidence is undisputed that the collision between the jeep pickup and the Ringsby truck involved bringing the jeep pickup in contact with the right front half of the Ringsby truck and the point of impact was on the North edge of the hard surface portion of the road. The jury could have found the fact to be that Byington, had he kept a proper lookout and had he kept his truck under proper control, could have avoided the collision by doing either of two things, either by turning his truck a matter of three or four feet to the left, and avoided colliding with the jeep pickup, or stopping or even reducing his speed and have avoided running over the jeep pickup with 61000 pounds of steel and explosives.

The court by its findings and by its granting the Motions to Dismiss in effect has said there is no evidence from which the jury might find the Defendant negligent,

which in effect is another way of saying that the law is that when a person traveling upon the highways sees an approaching vehicle go out of control that he has no obligation to stop or to so steer his vehicle as to avoid colliding with the vehicle out of control. This is exactly what driver Byington did in the instant case. His negligence consists of omissions, in not watching the course of the jeep pickup after it collided with the bridge, in not reducing the speed of his truck so that he could have stopped had the jeep pickup come within the path of the Ringsby truck, and when he saw the jeep pickup crossing the highway in front of his vehicle in not steering his vehicle to the left and avoiding the collision.

The court having found the fact to be that the jeep pickup "went out of control" when it hit the Southeast corner of the Red Creek bridge (See Finding No. 5, First Cause of Action R. 174, Finding No. 4, Second Cause of Action R. 175) found a fact which was undisputed in the testimony and certainly a fact which the jury would be justified in finding had the trial court allowed the case to go to the jury.

A presumption of due care attended Francis Howard, at least up to the time that his jeep pickup hit the bridge. There being no evidence as to what caused the jeep to hit the bridge, it is pure speculation whether it was caused by the negligence of Francis Howard or as the result of an unavoidable accident, such as a blown out tire or mechanical failure of the steering apparatus.

It is Plaintiff's contention that at the time the Howard pickup jeep struck the bridge, which was seen

by Byington, he was, as a matter of law, alerted to the potential danger in which the Howards were placed and that he had a continuing responsibility to watch the course of the jeep, bring his truck under such control that he could have stopped or steered his vehicle and avoided colliding with the rampaging jeep. This principle of law is laid down in the case of

Smith v. Gould, 110 W. Va. 579, 159 S.E. 53 W. Va. 1931

where Plaintiff's decedent alighted from a bus on the right-hand side of the road, walked back along the side of the road to the rear of the bus, where she started to cross the street and was struck by Defendant's car. The highway was straight at the point of collision. Mrs. Smith the decedent, did not look to her right, the direction from which the Defendant was coming. The Defendant saw someone alight from the bus when he was about 600 feet from it but he did not watch the person and did not again see the decedent until he was too close to her to avoid striking her, although he could have stopped his car in approximately its length. The court affirmed a verdict for the Plaintiff and among other things said,

> "We think it is a sound principle that the last clear chance doctrine is properly extended to a case where an automobilist, by reason of failure by him in his plain duty to maintain a lookout for the persons and property of others on the highway, commensurate with the danger indicated by attendant facts and surrounding circumstances known to him, and which are such as to have put him on the alert, causes injury to a pedestrian (though such pedestrian was himself concurrently

negligent), where the peril should have been seen and comprehended by the automobilist and the injury avoided in the exercise of reasonable care commensurate with the situation. Such case constitutes an exception to the general rule which precludes recovery by a plaintiff whose negligence has concurred with the defendant's."

See also

Leinbach v. Pickwick Greyhound Line, 38 Kan. 50, 23 Pac. 2d 449, Kan. 1933.

The court had a situation somewhat similar to the case at bar before it in the case of

Farrell v. Cameron, 98 Utah 68, 94 Pac. 2d 1068, Utah 1939.

where the Plaintiff, a passenger in the Cayias car sued the Defendant for personal injuries resulting from a collision between the Cayias car and the Defendant. The evidence was that the Defendant observed the Cayias car when more than 100 feet away, to have been partially on his left-hand side of the highway (the right hand side for the Defendant) and under those facts the court found there was ample time and room for the Defendant to have turned to the right and avoided the collision. Judge Wade stated:

"But the serious question in this case is whether the defendant was negligent in failing to turn his car slightly to his right and thereby avoid a collision. * * *

"The defendant could see the on-coming car; could see that if both cars continued in their course there would be a collision. Then the mere fact that the approaching car continued in its

course without making any move to turn was sufficient to warn the defendant that the driver of the on-coming car did not intend to turn and that it was his duty to make the turn before it was too late.

"On this point, in Saw v. Wilcox, Mo. App. 224 S. W. 58, 59, in discussing this question the court said: 'It may be that each of the parties approached too near the other * * * before making any move to avert a collision. Certainly one of the parties did so. The Plaintiff's driver says that he was driving about 15 miles per hour, and without slackening his speed came squarely toward and in the pathway of defendant's car till he was within 15 to 20 feet of same, before turning to go round him. It was, however, primarily defendant's duty to seasonably turn to the right and clear the way; but, when plaintiff saw he was not doing this, he should have put his car under control, and not waited till it was too late to turn aside.'

"It is our opinion that every driver who is taking reasonable care in driving his car will not stop to consider for even a moment whether the other driver is on his side of the road or not, where, as here, he has ample time and space to do so, but will move over and not take a chance, and avoid a collision. A driver who refuses to turn and avoid a collision under those circumstances, simply because he was on his right-hand side of the road, and the approaching car was slightly on its left-hand side of the road, would certainly be guilty of negligence. It is true that there was always a chance, up until it was too late for the defendant to turn, that the driver of the approaching car would make the turn slightly to the right and avoid a collision, and it is also

true that the driver of the approaching car, being on the wrong side of the road, had a greater duty to make this turn than did the defendant. But where, as in this case, the defendant had ample time and space to make the turn, the turn required being so slight that it could not in any way place defendant in danger or even inconvenience him, and where the risk of collision was fraught with such great possibilities of harm, not only to the defendant himself but also the driver of the approaching automobile and the other occupants thereof, the court was amply justified in finding the defendant was guilty of negligence.

"And unless there is something out of the ordinary it would be impossible to say that the approaching car would not turn to its proper side of the road, and it would never be safe for the car on its right-hand side of the road to turn to its left-hand side, because its driver could not be sure that the driver of the approaching car on the wrong side of the road would not turn to its right side of the road.

"On the other hand, there are many authorities, and we have found none to the contrary, which hold that where an automobile which is being driven on its right-hand side of the street is approaching another automobile which is being driven in the opposite direction and on its left-hand or wrong side of the street, it is the duty of the driver who is on the right-hand side of the street to use reasonable care to avoid a collision, even if the approaching car is being driven, in violation of the law of the road, on the wrong side of the street.

"In Berry on Automobiles, 6th Ed., 842, Sec. 995, it is said: 'A motorist on the right side of

the road must exercise reasonable care to avoid a collision with a car on the wrong side.' "

Other cases to the same effect

Mooney v. Chapdelaine, 11 At. 2d 713, N.H.

wherein

Blashfield Encyclopedia of Auto Law & Practice, Pa. Ed. Sec. 787

is quoted as follows:

"Whether it is the duty of a driver on the right side of the road seeing an auto approach on the wrong side of the road to stop to avoid a collision cannot ordinarily be determined as a matter of law. The driver who is on the right side may assume on the first appearance of the other vehicle, that it will change its course, and the particular point of time when he is no longer warranted in indulging in such assumption it is for the jury in an action for injuries resulting from a collision."

See also

Williams v. Brown, 181 So. 679, La. App.

Assuming negligence on the part of Francis A. Howard, which the jury might have found proximately contributed to his death, the jury still, upon the evidence presented, should have had the opportunity of passing on the question, as to whether the Defendants had a last clear chance to have avoided the collision resulting in Francis A. Howard's death, and if they should have so found, that there was such a last clear chance they could have found for the Plaintiff on her First Cause of Action.

Upon the Second Cause of Action, the one for the

death of Allen Howard, there is no contention that he was in any way negligent; so the Second Cause of Action is squarely within the holding in

Farrell v. Cameron, Supra.

As a practical matter, the sole question before the court on this appeal is whether or not the Defendant was negligent, the court having found in its Findings of Fact that the Defendant was not negligent. The guest cases by this fact are made authorities for reversal in this case. In the case of

Dennis v. Maher, 197 Wash. 286, 84 Pac. 2d 1029, Wash. 1938.

a passenger in a bus which collided with a vehicle traveling in the opposite direction upon the bus's right-hand side of the highway, sued for injuries. From an adverse decision the Plaintiff appealed and the court said,

> "It is sufficient to state that the question of whether or not the stage was proceeding at an excessive and unlawful rate of speed and whether the stage driver exercised reasonable care under the circumstances in applying his brakes and in not pulling off the highway to the shoulder of the road, and if either such affirmative action or failure so to act were the proximate cause of the collision, presented questions to the jury."

See also

Johnson v. Burnham, 198 Wash. 500, 88 Pac. 2d 833, Wash. 1938.

where there was a head-on collision between two vehicles upon a narrow bridge, wherein the court had the following to say:

"(2) In the case of Luther v. Pacific Fruit & Produce Co., 143 Wash. 308, 255 P. 365, 367, this court said: 'One driving an automobile along a public highway, who sees a car approaching on the wrong side of the road, has a right to assume that the driver thereof will observe the law of the road and seasonably turn over to the right, and he may proceed upon this assumption until he sees, or in the exercise of ordinary care ought to see, that his assumption is unwarranted. When the appellant became aware, or in the exercise of ordinary care should have become aware, that an accident was imminent, he was bound to look out for himself and to exercise the care of a prudent man for the purpose of avoiding an accident.' "

Many of the physical facts in the case at bar are similar to those in the case of

Morby v. Rogers, 252 Pac. 2d 231, Utah 1953.

where the court said,

"Reasonable minds, however, would be justified in inferring negligence on the part of defendant from circumstantial physical facts also brought out in the record. For example the lack of skid or brake marks would justify an inference against defendant's purported 'quick action' to avoid the accident. The final position of the automobile in the canal would justify a finding that defendant was traveling faster than his testimony indicated and that such speed indicated his lack of control over the automobile at the time of the accident. Furthermore, the testimony in regard to the boy's injuries would justify a finding that the deceased was struck with great force and was not just 'tipped over' as defendant and his wife testified. The fact that extent of injury to the

> bicycle consisted of a damaged rear mud guard and there was no injury to the front of the bicycle would justify a finding that the boy did not turn into defendant as was contended, but was rather struck from behind. In addition to this reasonable minds could find from the point of impact and the position of deceased's body, that the boy had not made any sudden turn but had gradually veered over onto the west portion of the highway before he was struck."

Applying the facts in the case at bar we can say the lack of brake or skidding marks would justify an inference that Defendant failed to do anything to avoid the accident. The final position of the truck, the distance of travel and the damage done to it when it collided with the boulder will justify a finding that the Defendant was traveling faster than his statement to the witnesses indicated and that such speed indicated loss of control over the truck at the time of the accident. In the case at bar there is no doubt that the jeep pickup was hit with great force and violence. In addition to the fact the jeep pickup hit the right-hand half of the Ringsby truck would justify the jury in finding that if the Defendant Byington had been keeping a proper lookout and had turned his truck slightly, a matter of 4 or 5 feet to his left, or the South side of the highway, that he would have avoided the collision.

The editors of American Law Reports have a very extensive annotation on the last clear chance doctrine,

92 A. L. R. 47

The editor's conclusion after 100 pages of annotation is stated in the following language:

> "The courts are practically agreed that the doctrine applies upon the assumption that the defendant actually discovered, and in the circumstances ought to have realized, the danger in time by the exercise of reasonable care, by the use of the instrumentalities then under his control and under the conditions then existing, to avert the accident, even though the defendant's conduct is properly characterized merely as negligence."

It is admitted by all concerned that the Defendant actually discovered the hazardous condition in which the two deceased members of the Howard family found themselves. This danger was discovered by the Defendant Byington in time so that by the exercise of reasonable care and by the use of the instrumentalities then under his control and under the conditions then existing he could have averted the accident. It is submitted that the court should have allowed the matter to go to the jury and accordingly the court erred in granting Defendant's motions and entering its Findings of Fact and Judgment. It is respectfully prayed that the Judgment be reversed, and the matter returned to the trial court for new trial.

Respectfully submitted,

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